IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:	)	
	)	
BENNETT TRADING, INC.,	)	**Case No. 01-16115**
	)	**Chapter 7**
	)	
Debtor.	)	
	)	
STEVEN L. SPETH, Trustee,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Adversary No. 03-5329**
	)	
UTE MOUNTAIN FARM AND RANCH ENTERPRISE,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

The trustee brings this adversary proceeding to avoid an alleged preferential transfer by the debtor to defendant Ute Mountain Farm and Ranch Enterprise ("Enterprise") under 11 U.S.C. § 547(b).[1] In response, the Enterprise has moved to dismiss the complaint[2] for lack of personal and subject matter jurisdiction, asserting that (1) it has not been properly served under Fed. R. Bankr. P. 7004; and (2) it enjoys sovereign immunity from this avoidance action because it is an agency of a

[1] Unless otherwise noted, all subsequent statutory references are to the Bankruptcy Code, 11 U.S.C. § 101, et seq.

[2] Dkt. 7 and 8.

federally-chartered Indian Tribe.[3] The trustee replies that while his service on the Enterprise is deficient, the deficiency is a harmless error under Fed. R. Bankr. P. 9005[4] that can be remedied by the Court so long as no party is harmed. Moreover, he asserts that because the charter of the Enterprise contains a clause permitting the Enterprise to sue or be sued in either the Ute Mountain Tribal Court or the United States District Court, the Enterprise has waived whatever immunity it has.[5] Oral argument on the Enterprise's motion was held March 16, 2004.

Factual Background

In his complaint,[6] the trustee alleges that the debtor Bennett Trading, Inc. filed bankruptcy on December 27, 2001. For his jurisdictional allegations, the trustee asserts that the adversary proceeding is a core proceeding and that the Court has jurisdiction pursuant to 28 U.S.C. § 157. The trustee further alleges that the Enterprise received payments totaling $121,276.03 from the debtor and that these payments are a preferential transfer under 11 U.S.C. § 547 requiring their return to the bankruptcy estate. These are the only substantive allegations of the trustee's complaint and there are no attachments to the complaint.

Motion to Dismiss Standards

The Enterprise's attack on the sufficiency of service of process is a challenge to this Court's exercise of personal jurisdiction over the Enterprise under Fed. R. Civ. P. 12(b)(2) and (5). The

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[3] *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed. 2d 106 (1978); Indian Reorganization Act, 25 U.S.C. §§ 476 and 477.

[4] Rule 9005 makes Fed. R. Civ. P. 61 applicable in bankruptcy cases.

[5] The trustee also emphasizes that he has not named the Tribe as a party defendant; rather, his cause of action is asserted against the Enterprise, which he claims is a separate and distinct entity.

[6] The adversary complaint was filed October 15, 2003. *See* Dkt. 1.

trustee bears the burden of establishing personal jurisdiction and validity of service of process on the Enterprise.[7]

The Enterprise's assertion of tribal sovereign immunity is a challenge to this Court's subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). The trustee, as the party invoking federal jurisdiction, also bears the burden of establishing subject matter jurisdiction.[8] While the Enterprise's sovereign immunity claim does not go to the sufficiency of the facial allegations of the complaint,[9] the Enterprise's claim does challenge the facts upon which this Court's subject matter jurisdiction is based.[10] In this instance, the court is permitted to consider matters outside the pleadings to resolve disputed jurisdictional facts, including conducting a limited evidentiary hearing, without converting the Rule 12(b)(1) motion to dismiss to a motion for summary judgment.[11]

Facts Pertaining to Service of Process

With respect to service, the record indicates that the trustee attempted to serve the Enterprise by mailing a summons and complaint addressed to the Enterprise at a post office box without

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[7] *F.D.I.C. v. Oaklawn Apartments*, 959 F.2d 170, 174 (10th Cir. 1992); *OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086, 1091 (10th Cir. 1998).

[8] *Sac & Fox Nation of Oklahoma v. Cuomo*, 193 F.3d 1162, 1165 (10th Cir. 1999).

[9] Here, the trustee's complaint clearly alleges that this is a core proceeding and that subject matter jurisdiction is based upon this being a preference action under § 547 of the Bankruptcy Code.

[10] *See Holt v. United States*, 46 F.3d 1000, 1002-03 (10th Cir. 1995), recognizing two forms of challenges to the court's subject matter jurisdiction. *See also, United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 547 (10th Cir. 2001).

[11] *Id.* at 1003. *See also, Winnebago Tribe of Nebr. v. Kline*, 297 F. Supp. 2d 1291, 1298 (D. Kan. 2004).

reference to a person in charge.[12] The trustee commented in argument that he had engaged in conversations with the tribal counsel who was told the summons was forthcoming. Even if the record properly before the Court supported that, nothing in the record suggests that the Enterprise waived service of process in this case.

Facts Pertaining to Sovereign Immunity

In support of its sovereign immunity defense, the Enterprise has attached to its motion to dismiss, the affidavit of general counsel for the Ute Mountain Ute Tribe which seeks to authenticate attached copies of the Ute Mountain Tribe Constitution and By-laws, a resolution of the Ute Mountain Tribal Council regarding the Enterprise, and the charter of the Enterprise.[13] The affidavit and attached documentation show the following.

The Ute Mountain Tribe ("Tribe") adopted its Constitution and By-laws on May 8, 1940 and, pursuant to 25 U.S.C. § 476, the Secretary of the Interior approved the Constitution on June 6, 1940. Under the Constitution, as amended, the governing body of the Tribe is the Tribal Council which consists of seven members elected by various constituencies on the Ute Mountain Reservation. Under Article V of the Tribe Constitution, the Tribal Council is empowered to select subordinate boards and officials and to manage the tribal herds.

The Tribal Council enacted a resolution on February 20, 1987 creating the Ute Mountain Farm and Ranch Enterprise.[14] The resolution states that the purposes of the Enterprise are to further the long

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[12] *See* Dkt. 3.

[13] The affidavit also contains a statement that no blanket waiver of tribal immunity has been made, nor is it the policy of the Ute Mountain Tribe to waive such immunity without a resolution of the Tribal Council.

[14] Nowhere in the language of this resolution or the Enterprise charter is the Enterprise referred to as an "agency" of the Tribe.

term development of stability of the Tribe and maximize employment and revenue to the Tribe and its members.

The charter of the Enterprise provides that its purposes are to create a "Tribally owned farm and ranch" to develop the "natural and human resources" of the Tribe and to create substantial revenue and full employment to tribal members. Under the charter, the Enterprise is a separate and distinct entity from the Tribe; however, the Enterprise's Board of Directors shall consist of the executive committee of the Tribal Council. The Enterprise charter provides in paragraph 13 that the Enterprise may "sue and be sued in the Ute Mountain Tribal Court and/or United States Federal District Court." It also states that the "power" to sue or be sued is "limited to the separate and distinct assets of the Enterprise." Enterprise's counsel informed the Court at oral argument that there are no such separate assets; this comment, however, is without basis in the record. Finally, the Enterprise charter provides that an Enterprise Manager, hired by the Board of Directors, shall be the principal officer of the Enterprise.

While 25 U.S.C. § 477 provides for the chartering of tribal enterprises separate and apart from constitutional tribal entities, subject to the approval of the Secretary of Interior, there is no record before this Court concerning whether the Enterprise is a § 477 entity.

Analysis

Sufficiency of Service of Process – Fed. R. Civ. P. 12(b)(2) and (5)

The trustee has failed to properly serve the Enterprise. To the extent that Fed. R. Bankr. P. 7004 authorizes mail service on a sovereign Indian nation or its agencies or enterprises, service upon an officer or agent authorized to accept same would seem necessary.[15] Mail service on a "state or

[15] The Court expresses no opinion whether Rule 7004 permits service by mail on the reservation of a federally recognized Indian tribe.

municipal corporation or other governmental organization thereof subject to suit" must be mailed to the person or office designated by state law and, in the absence of such designation, upon the chief executive officer of the entity.[16] Service on a federal governmental entity is made by mailing the summons and complaint to the attention of an officer of the agency, if it is a corporation, and to the civil process clerk of the United States Attorney or to the United States Attorney General.[17] Similarly, mail service on a domestic or foreign corporation is made by mailing a copy of the summons and complaint to an officer or managing agent or a designated service agent.[18] The trustee made no attempt to serve the Enterprise by any of these methods.

The trustee's reliance on Fed. R. Bankr. P. 9005, and by application, Fed. R. Civ. P. 61, to save the defect in service is unconvincing. This is the "harmless error rule." The trustee cites no case holding that the harmless error analysis is applicable to a claim of insufficient service of process. This rule states that when appropriate, the court may cure an omission which does not affect substantial rights. Inadequate service is not harmless error. Proper service is at the core of the Court's jurisdiction over the served party and is "substantial."[19] Rule 9005 does not apply here.

However, Fed. R. Civ. P. 4(m), made applicable in adversary proceedings by Fed. R. Bankr. P. 7004(a), but not mentioned by the trustee, does provide a basis for relief, even where the statute

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[16] Fed. R. Bankr. P. 7004(b)(6).

[17] Fed. R. Bankr. P. 7004(b)(5).

[18] Fed. R. Bankr. P. 7004(b)(3).

[19] *See Turney v. F.D.I.C.*, 18 F.3d 865 (10th Cir. 1994) (In bankruptcy proceeding both debtors and creditors have constitutional right to be heard on their claims and denial of that right is denial of due process which is never harmless error); *United States v. Mendez-Lopez*, 338 F. 3d 1153 (10th Cir. 2003) (In a criminal felony case, the magistrate judge exceeds jurisdiction by selecting jury and harmless error analysis does not apply; it is basic law that defendant's right to have all critical stages of criminal trial be conducted by a person with jurisdiction to preside).

of limitations has run on the trustee's cause of action. Under Rule 4(m), the trustee had 120 days from the filing of the adversary complaint to obtain service on the Enterprise. More specifically, however, Rule 4(m) permits a court to extend the 120 day deadline for service:

> If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion *or on its own initiative* after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant *or direct that service be effected within a specified time;* provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.

The majority of the courts that have interpreted Rule 4(m), as amended in 1993, have concluded that a court now has both discretionary power and a mandatory obligation to enlarge the 120 days service requirement. Upon a showing of good cause by the plaintiff, the court is *required* to extend the time for service. Absent a showing of good cause, the court has the discretion to enlarge the deadline to obtain service.[20] The Tenth Circuit recognizes this discretionary power to enlarge the 120 day deadline, without a showing of good cause.[21] The trustee neither advocates nor has shown good cause in the limited record before this Court that would require the Court to extend the 120-day deadline.[22] This leaves the question of whether the Court should exercise its discretion and enlarge the time for service on its own initiative.

The Advisory Committee notes to the 1993 amendment to Rule 4(m) state:

The new subdivision explicitly provides that the court shall allow additional time if

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[20] *See In re Lopez*, 292 B.R. 570 (E.D. Mich. 2003); *In re Harnischfeger Industries, Inc.*, 288 B.R. 79 (Bankr. D. Del. 2003); *In re Bertain*, 215 B.R. 438 (9th Cir. BAP 1997); *Petrucelli v. Bohringer & Ratzinger, GMBH*, 46 F.3d 1298 (3rd Cir. 1995); *Thompson v. Brown*, 91 F.3d 20 (5th Cir. 1996); *Adams v. Allied Signal Gen. Aviation Avionics*, 74 F.3d 882 (8th Cir. 1996).

[21] *See Espinoza v. United States*, 52 F.3d 838 (10th Cir. 1995).

[22] The trustee did concede at oral argument, however, that no other attempts at service have been made.

> there is good cause for the plaintiff's failure to effect service in the prescribed 120 days, and authorizes the court to relieve a plaintiff of the consequences of an application of this subdivision even if there is no good cause shown. . . . *Relief may be justified, for example, if the applicable statute of limitations would bar the refiled action, or if the defendant is evading service or conceals a defect in attempted service.* (Emphasis added.)

In *Espinoza, supra,* the Tenth Circuit focused in large part upon the fact that if dismissed without prejudice, a re-filed action would be time-barred.[23] According to the Court's calculations, the trustee is now approximately 50 days past the 120 day time limit and the statute of limitations has run on the preference action,[24] thus making a dismissal here effectively with prejudice. Pursuant to Fed. R. Civ. P. 4(m), the Court will exercise its discretion and extend the trustee's time to properly serve the Enterprise as set out below.

Sovereign Immunity – Fed. R. Civ. P. 12(b)(1)

Assuming that appropriate service of process is obtained, this Court will still be faced with determining whether the Enterprise enjoys sovereign immunity from the jurisdiction of the Bankruptcy Court with respect to this matter. Analysis of that issue is less than straightforward but starts with the general legal proposition that Indian Tribes are sovereign immune from suit unless their immunity has

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[23] *Espinoza v. United States*, 52 F.3d 838 (10th Cir. 1995) (Factors to be considered in determining whether permissive extension of time to effect service was warranted included limitations period governing plaintiff's claim and fact that plaintiff was proceeding pro se). *See also, In re Harnischfeger Industries, Inc., supra* at 87 where the court concluded that the following factors weighed in favor of a discretionary extension of time: preference action would be time-barred by 2 year statute of limitations, plaintiff immediately attempted service (albeit ineffectively) upon filing of the complaint, no prejudice to defendant in allowing additional time for service, and defendant had notice of adversary complaint through its attorney even though service on the attorney was ineffective.

[24] By the Court's calculations, the two year limitations period expired December 27, 2003. *See* § 546(a)(1)(A).

been abrogated by federal statute or the Tribe has expressly waived it.[25] The trustee does not assert that Congress has abrogated tribal immunity with reference to his preference cause of action. While it might be argued that the Bankruptcy Code's § 106(a) abrogation of sovereign immunity of a "governmental unit" applies to Indian tribes, the Tenth Circuit Bankruptcy Appellate Panel has concluded that Indian tribes are not "governmental units" as they are defined in § 101(27).[26] The Court notes that the Ninth Circuit has recently held to the contrary and that Judge McFeeley's persuasive dissent in *Mayes* is among the authorities relied upon in that case.[27] Nevertheless, this Court is persuaded by the majority's opinion in *Mayes* as well as the reasoning in another Tenth Circuit BAP case, *In re Straight*,[28] that § 106(a) may be altogether unconstitutional. The trustee finds no succor in § 106(a).

Instead, the trustee relies exclusively upon the presence of a "sue and be sued" clause in the Enterprise's charter as an express waiver of tribal immunity. The Enterprise, in turn, suggests that the clause is merely "boilerplate," meaningless, and, in any event, not an express waiver of immunity. The Enterprise points to the Supreme Court's decision in *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*[29] where it was held that a tribe did not waive sovereign immunity from suit in state court by executing a promissory note. It uses *Kiowa* as the basis for a rule that a tribe does not waive immunity when it participates in commerce. Unlike the instant case, *Kiowa* deals with a consensual

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[25] *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed. 2d 106 (1978).

[26] *See In re Mayes*, 294 B.R. 145, 148 n. 10 (10th Cir. BAP 2003) (stating that Indian tribes are probably not "domestic governments" within the meaning of 11 U.S.C. § 101(27), although recognizing cases to the contrary).

[27] *See Krystal Energy Company v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004).

[28] *Straight v. Wyoming Dep't of Transp. (In re Straight)*, 248 B.R. 403 (10th Cir. BAP 2000).

[29] 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed. 2d 981 (1998).

contract, not a federal statutory cause of action and there is no mention in *Kiowa* of the presence or absence of a sue and be sued clause in the tribe's charter.

The Enterprise presents a number of cases from the Tenth Circuit and other circuits dealing with the effect of sue and be sued clauses found in tribal constitutions, charters, ordinances and resolutions. To say the least, the law is murky. Tenth Circuit law on this point is sparse, but appears to set up a "constitutional/corporate" dichotomy as follows. The presence of a sue and be sued clause does not waive a tribe's sovereign immunity when it is being sued for conduct undertaken in its constitutional or governmental capacity. However, where the challenged conduct of a tribe or tribal entity is undertaken in its corporate capacity, a sue and be sued clause does operate as a waiver of sovereign immunity. The Court reaches this conclusion by reviewing a series of five cases starting with *Merrion v. Jicarilla Apache Tribe*.[30]

In *Merrion*, a tribe enacted an oil severance tax ordinance levying tax on oil drilled on Indian lands. The ordinance contained an express consent to suit in the United States District Court. The Tenth Circuit concluded this apparent express waiver of immunity from federal jurisdiction was enforceable. In *Seneca-Cayuga Tribe v. State ex rel. Thompson*,[31] the Tenth Circuit held that the presence of a sue and be sued clause did not necessarily waive tribal sovereign immunity from suits relating to tribal political activity. In *Kenai Oil & Gas, Inc. v. Dept. of Interior of U.S.*,[32] the Circuit stated in a footnote that it lacked evidence whether the plaintiff had been dealing with the tribal corporation or the tribal government, suggesting that the government might well be immune. In *Ramey*

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[30] 617 F.2d 537 (10th Cir. 1980).

[31] 874 F.2d 709, 715 n. 9 (10th Cir. 1989).

[32] 671 F.2d 383, 384 n. 1 (10th Cir. 1982).

Const. v. Apace Tribe of Mescalero Reservation,[33] the presence of a sue and be sued clause was insufficient to waive immunity where the plaintiff dealt with the tribe as a constitutional and not a corporate entity established under 25 USC § 477.

This line of cases culminates in *Ute Distribution Corp. v. Ute Indian Tribe*,[34] issued after *Kiowa*, in which certain half-blood members of the Ute tribe (apparently a different organization than that before us today) sued the Tribe concerning access to water rights.[35] Recognizing that the immunity of Indian tribes is subject to the superior and plenary control of Congress, the court held that a waiver of sovereign immunity must be unequivocally expressed, as required in *Santa Clara Pueblo*, but that the source of expression may be by statute, by overriding national interest, or by a statement found in a tribal charter. Citing to *Seneca-Cayuga*, the panel held that any waiver provided by a sue and be sued clause was limited to the corporate activities of the tribe and did not extend to the actions of the tribe as a political or governing body.[36] Because *Kiowa* is factually distinguishable from the instant case (and from *Ute Distribution*), this Court concludes that *Ute Distribution* is the controlling authority on this question.

The legal issue before this Court then boils down to whether the trustee's action against the Enterprise arises out of the Enterprise's corporate activities or the Tribe's political activities. The record on that question is virtually non-existent. The Court could *assume* that the payments sought to

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[33] 673 F.2d 315, 320 (10th Cir. 1982) (Trial court found that Ramey contracted and dealt only with the Mescalero Apace Tribe as a constitutional entity, and not with the Mescalero Apace Tribe, Inc., the tribal corporate entity and therefore the sue and be sued clause in the corporate charter did not effect a waiver of immunity of the Tribe).

[34] 149 F.3d 1260 (10th Cir. 1998).

[35] *Ute Distribution* was issued in July of 1998. *Kiowa* was decided in May of that same year.

[36] 149 F.3d at 1268.

be recovered were for grain or produce of the Enterprise, but not even the complaint suggests that. As noted previously, in considering a Rule 12(b)(1) motion to dismiss for lack of jurisdiction, the Court may consider matters outside the pleadings.[37] The only matters available today are the pleadings, the affidavit of tribal counsel, and the Tribe and Enterprise documents. While the trustee has countered with the sue and be sued clause in the Enterprise's charter, he has brought the Court no evidence upon which to base any conclusions about the nature of the transactions leading to the payments, whether the Enterprise is a § 477 entity, or whether the transactions pertain to corporate or constitutional activity. The answers to these questions are necessary predicates to a determination whether this Court has subject matter jurisdiction of this action.

Therefore, the Enterprise's motion is DENIED WITHOUT PREJUDICE. The trustee shall make proper service of process on the Enterprise within 30 days of the entry of this order. The Enterprise shall have 30 days after such service to answer or, in the alternative, to renew its motion to dismiss. If the motion to dismiss is renewed, the trustee will be required to demonstrate that this Court has jurisdiction of this matter. The issues of the nature of the Enterprise, whether it is a § 477 entity, and whether it was acting in its corporate or governmental capacity when it received the payments the trustee seeks to recover, will be critical to that determination. If the Enterprise decides to answer the complaint rather than pursue a renewed motion to dismiss, the Clerk shall set the matter for a prompt scheduling conference and the parties shall comply with Fed. R. Civ. P. 26 accordingly.

Dated this 6th day of April, 2004.

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ROBERT E. NUGENT
CHIEF BANKRUPTCY JUDGE

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[37] *See* Note 11, *supra* at p. 3.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF KANSAS

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the **Memorandum Opinion** was deposited in the United States mail, postage prepaid on this 7th day of April, 2004, to the following:

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